Supreme Court, U.S.
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NO. 85-660

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

THE STATE OF COLORADO,

Petitioner,

v.

FRANCIS BARRY CONNELLY,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF COLORADO

BRIEF OF PETITIONER

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QUESTIONS PRESENTED FOR REVIEW

1. Did the respondent's mental condition render his initial, unsolicited confession to murder constitutionally involuntary?

2. Did the respondent's mental condition render his waiver of Miranda rights ineffective?

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CITATION

People v. Connelly, 702 P.2d 722 (Colo. 1985).

JURISDICTIONAL STATEMENT

The jurisdiction of this court is invoked by writ of certiorari, pursuant to 28 U.S.C. Sec. 1257 (1966), on the ground

that the highest court of the State of Colorado has rendered a final judgment in which a right, privilege or immunity is specially set up or claimed under the Constitution of the United States. The Petition for Writ of Certiorari was filed within 60 days of the date of the Colorado Supreme Court's order giving final effect to its interlocutory opinion as required by United States Supreme Court Rule 20.1. The Petition for Writ of Certiorari was granted on January 13, 1986.

CONSTITUTIONAL PROVISIONS

1. U.S. Const. Amend. V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or

property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. U.S. Const. Amend. XIV, Section 1:

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The respondent is the defendant in a prosecution for second degree murder filed in Denver, Colorado on August 31, 1983 (J.A. 1). He was held incompetent to proceed until March 7, 1984 (J.A. 1). On May 25, 1984 the district court heard the defendant's motion to suppress his confession and suppressed all statements made to the police and any evidence

derived from them as involuntary and in violation of Miranda rights (J.A. 37-51). The petitioner took an interlocutory appeal to the Colorado Supreme Court, which affirmed the suppression of the defendant's statements on July 8, 1985, and remanded for further proceedings relative to any derivative evidence. Petition for Writ of Certiorari, Exhibit A. The Petition for Writ of Certiorari was granted by this court on January 13, 1986, and the parties were requested to address the effectiveness of the defendant's waiver of Miranda rights (J.A. 52).

At the May 25 suppression hearing, the district court heard the testimony of Officers Anderson and Antuna, to whom the statements were made; Greta Lindecrantz, an investigator for the public defender who observed the defendant after his

confession; and Dr. Metzner, a psychiatrist who examined the defendant. This is the only testimony taken thus far in the case. At the conclusion of the hearing, the district court made findings of fact and conclusions of law in its ruling, which included the following.

On August 18, 1983 the defendant approached Officer Anderson, who was in uniform in downtown Denver, and told him that he had killed someone and wanted to talk about it with the police. After the defendant was advised of his Miranda rights, searched, and cuffed, he told Anderson that he had killed a girl with whom he had been travelling about November of 1982 in the vicinity of West Mississippi Avenue (J.A. 37-38).

Anderson notified the Denver Police Department and when Detective Antuna arrived, he uncuffed and readvised the

defendant and took him to police headquarters. The defendant told Antuna that he had been travelling with a young Indian girl named Mary Ann Junta. When a records check indicated that an unidentified female had been killed, the defendant was asked and agreed to take police officers to the location of the homicide (J.A. 39). He walked to the rear of a building, became visibly upset, said he was frightened, and walked into a storage room where he said the killing happened (J.A. 40).

The court found that no suggestions were made and no directions were given by the officers. They merely followed instructions (J.A. 40). The defendant appeared to Detective Antuna to be sane, not ill in any way, and oriented at least as to place (J.A. 40-41). The conduct of the officers could not in any way be

considered by the court to be overbearing or coercive (J.A. 41), and there was legally nothing untoward in the police actions in receiving and recording the defendant's statements to them (J.A. 43).

The ultimate conclusion of Dr. Metzner was that the defendant was suffering from chronic schizophrenia when he was told by the voice of God to go to Denver from Boston and tell the police everything or kill himself (J.A. 42-43). The court found that the defendant did not exercise free will in making the statements because his choices were mandated by auditory hallucinations and had no basis in reality (J.A. 47). Similarly, the court found that the defendant did not effectively waive his Miranda rights because he would sign anything or do anything to follow what he

considered to be the mandate of God to confess (J.A. 48-49).

SUMMARY OF THE ARGUMENT

1. The Due Process Clause of the Fourteenth Amendment protects individuals from official overreaching. To the extent that the old due process voluntariness standard for determining the admissibility of confessions is a constitutional standard, it is limited to protection against official overreaching. While some confessions may be held inadmissible for other evidentiary or policy reasons, confessions are properly suppressed as constitutionally involuntary only if they were obtained through official overreaching and only then are the formal and substantive consequences of a due process violation involved.

2. The Miranda warnings and the old due process voluntariness standard are

designed to vindicate the same rights, the former applying to inherently coercive custodial interrogation. An effective waiver of Miranda rights, like waiver of constitutional trial rights, must be knowing and intelligent. As a matter of due process generally, it must also be voluntary. A waiver of Miranda rights is therefore effective if it is knowing and intelligent and not the product of some other type of official overreaching.

ARGUMENT

I. THE COLORADO SUPREME COURT ERRED IN HOLDING THAT THE DEFENDANT'S INITIAL, UNSOLICITED CONFESSION WAS PROPERLY SUPPRESSED AS INVOLUNTARY.

The Colorado Supreme Court affirmed suppression of the defendant's initial statement as involuntary, despite finding that it was unsolicited and not the product of questioning or any form of police action. It held squarely that there need be no official action

whatsoever in obtaining a confession for its suppression to be required as a matter of due process of law. Relying upon language from Culombe v. Connecticut, 367 U.S. 568 (1961), and Townsend v. Sain, 372 U.S. 293 (1963), the Colorado court found that the ultimate test for voluntariness is whether the statement was the product of a rational intellect and a free will. If it was, it may be used against is maker at trial; if not, its admission at trial offends due process of law. Slip op. at 18. Similarly, it relied upon Blackburn v. Alabama, 361 U.S. 199 (1960), for the proposition that one's capacity for rational judgment and free choice may be overborne as much by certain forms of severe mental illness as by external pressure. Slip op. at 19.

Although the prior holdings of this court relied upon by the Colorado court

use the terms "rational intellect" and "free will" in describing the due process voluntariness standard, they cannot be read so broadly as to require suppression based on mental factors alone. They each address a situation of custodial interrogation and oppressive circumstances. In each case the defendant not only suffered from a mental defect; he was subjected to prolonged interrogation. Both the factual circumstances being addressed and the context in which the words were used make clear that the court intended to protect against the individual's will being overborne by official coercion. The scope of the protection should be construed in light of the evil to be protected against.

In fact, this court has never decided a case or controversy in which it found the use of an unsolicited confession to be

a violation of due process. To the contrary, it has consistently, and very recently, emphasized that the voluntariness standard contained in the Due Process Clause is concerned with the effects of interrogation techniques and official practices on the individual. In Miller v. Fenton, 106 S.Ct. 445 (1985), the court referred to official conduct no fewer than ten times in defining the nature of the due process voluntariness standard. Using terms like "interrogation techniques," "extracted," "improperly obtained," and "tactics for eliciting," the court held, in sharp contrast to the Colorado court below, that the ultimate issue is not a matter of "psychological fact" at all but rather is a legal one - whether the state has obtained the confession in a manner that comports with

due process. Miller v. Fenton, 106 S.Ct. at 450. Summarizing, the court said:

> Although sometimes framed as an issue of "psychological fact," Culombe v. Connecticut, 367 U.S., at 603, 81 S.Ct., at 1879, the dispositive question of the voluntariness of a confession has always had a uniquely legal dimension. It is telling that in confession cases coming from the States, this court has consistently looked to the Due Process Clause of the Fourteenth Amendment to test admissibility. See, e.g., Mincey v. Arizona, 437 U.S., at 402, 98 S.Ct., at 2418. The locus of the right is significant because it reflects the Court's consistently held view that the admissibility of a confession turns as much on whether the techniques for extracting the statements, as applied to this suspect, are compatible with a system that presumes innocence and assures that a conviction will not be secured by inquisitorial means as on whether the defendant's will was in fact overborne. See, e.g., Gallegos v. Colorado, 370 U.S. 49, 51, 82 S.Ct. 1209, 1211, 8 L.Ed.2d 325 (1962)(suggesting that "a compound of two inferences" requires that some confessions be condemned); Culombe v. Connecticut, 367 U.S., at 605, 81 S.Ct., at 1880 (describing voluntariness as an "amphibian"). This hybrid quality of the voluntariness inquiry, subsuming as it does, a "complex of values,"

> Blackburn v. Alabama, 361 U.S., at 207, 80 S.Ct., at 280, itself militates against treating the question as one of simple historical fact.

Id. at 453.

It is certainly telling that the voluntariness of confessions from state courts has been analyzed in terms of due process because the Due Process Clause of the Fourteenth Amendment protects individuals from an abuse of power by government officials. Daniels v. Williams, 106 S.Ct. 662 (1986). To the extent that the "voluntariness" of a confession is a "convenient shorthand" for the "complex of values" involved in the Due Process Clause, it can be concerned only with official overreaching. Whether or not one acts according to his free will, however that concept may be defined, is a question of "psychological fact" and should be distinguished from the question

whether or not one is officially deprived of his free will. To guarantee an individual that he will not be forced by the state to confess is one thing; to limit the circumstances under which he will be permitted to confess is quite another. At issue is the nature of the influences on one's exercise of free will that can and should be considered constitutionally cognizable.

The Colorado court did not address the content of the complex of values protected by the Due Process Clause. Instead it treated "voluntariness" simply as a question of psychological fact,[1]

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[1]This confusion about the nature of the voluntariness determination also appears in disputes over whether the jury should ultimately pass on a due process question, by what standard of proof, and how the term "voluntary" should be defined for them. See Kwiatkoski v. People, 706

(Footnote Continued)

without regard to the source of the influences on the defendant's will, and it considered the significant question to be whether there was sufficient state action to make the Fourteenth Amendment applicable. It found sufficient state action in the prosecution's use of the confession at trial. The court offered no explanation why the use of a confession not obtained in any constitutionally offensive way is itself constitutionally offensive and made no attempt to articulate the value to be protected by

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(Footnote Continued)
P.2d 407 (Colo. 1985)(given amorphous nature of term, effort to articulate precise definition might unduly restrict jury in consideration of voluntariness of confession); People v. Deeds, 83CA0080, ___P.2d ___ (Colo. App. July 3, 1985) cert. granted January 27, 1986 (jury finding need only be by a preponderance of evidence despite Colorado pattern jury instruction requiring proof beyond a reasonable doubt).

due process of law. The Due Process Clause protects against official abuse of power or overreaching, not simply against any official action. By looking for a reason why it was permitted to suppress the confession rather than considering whether the confession was one that should be suppressed, the Colorado court failed to advance the inquiry or help define the kinds of influences against which confessions should be protected.

The constitutional right primarily implicated by pre-trial confessions is the Fifth Amendment's privilege against compelled self-incrimination. But the Fifth Amendment is concerned only with official coercion, and not with moral or psychological pressures emanating from any other source. Oregon v. Elstad, 105 S.Ct. 1285 (1985). Therefore, preservation of the defendant's Fifth Amendment trial

right cannot justify suppression here. More importantly, however, the express limitation of the Fifth Amendment to protection against official coercion reflects the nature of the due process protection and implies that the constitution does not prohibit the use of self-incriminating statements that are not the result of official coercion.

The due process prohibition against official overreaching in obtaining a confession has been construed broadly to include not only police conduct that is inherently coercive but also techniques that are improper only because in the circumstances of a particular case, they result in a confession unlikely to have been the product of a free will. Miller v. Fenton, 106 S.Ct. at 450. But where there is no causal relationship between official action and the absence of free

will, that is, where a confession can in no way be considered obtained by official overreaching, the only remaining consideratons are evidentiary. Pressure from any other source, whether it be moral, psychological, or private,[2] may affect the probative value of a confession, but questions of relevance and admissibility have always been within the discretion of the trial court and should

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[2]For its theory of official action by using a confession not obtained by official coercion, the Colorado court relied on its prior holding in Hunter v. People, 655 P.2d 374 (Colo. 1982), in which the confession was given to a security guard. See also Kwiatkoski v. People, 706 P.2d 407 (Colo. 1985)(confession to supervisor and security consultant). While confession to some private individuals might be treated as official under some "public function" theory, Colorado's theory of official action by use of any confession is too broad.

The narrower case against suppression strictly because of mental factors is ably made in the dissent by Justice Erickson.

remain so. The Fourteenth Amendment may protect against police practices that lead to unreliable evidence, but it does not directly insure the reliability of the evidence itself.

Because the due process stricture against involuntary confessions involves a comple. of values, a due process violation requires exclusion of evidence without regard to its reliability. Jackson v. Denno, 378 U.S. 368 (1964). The same rationale for exclusion does not apply to confessions made under pressure from other sources. Confessions made under moral, psychological, or even private pressure should be excluded only when they lack evidentiary value. Whether a particular confession is excluded as involuntary rather than simply as unreliable evidence is significant because characterization as a violation of due process entails a

number of formal differences in treatment including the burden of proof, the scope and standard of review, and even the reviewing court.

Perhaps most important, however, is the treatment of derivative evidence. The rationale articulated in Wong Sun v. United States, 371 U.S. 471 (1963), for exclusion of evidence derived from official misconduct simply cannot apply to a confession that was not the product of official overreaching. Evidence derived from a confession can be instrumental in corroborating it and establishing its reliability. Likewise derivative evidence can be probative of guilt in itself, without reference to the confession from which it was derived. In the absence of official misconduct in obtaining a confession, the reasons for excluding

either reliable confessions or evidence derived from confessions evaporate.

The old due process voluntariness standard has long been recognized as a hybrid, subsuming a complex of values that escape precise definition. The voluntariness determination is to be made by examining the totality of the circumstances. But the anchor that has kept it from floating about freely in a sea of philosophic questions about determinism and free will has been the requirement for a causal relationship between official action and the absence of free will. The influences on the exercise of free will that will be considered improper in the constitutional voluntariness determination are not well defined, but for sound political, as well as practical, reasons they have thus far been limited to the behavior of officials.

To continue to read the Due Process Clause this way will not leave important individual interests unprotected. Evidentiary concerns about involuntary confessions were protected by evidentiary rules long before the doctrine became constitutional law. It is important, however, that the administration of justice not be hindered by the exclusion of valuable, probative evidence simply because the constitutional rule of exclusion has not been tailored to the evil it was designed to prevent. The holding of the Colorado court either trivializes the Fourteenth Amendment by elevating evidentiary considerations to questions of constitutional magnitude, see Daniels v. Williams, 106 S.Ct. at 665, or, worse, excludes even probative evidence of guilt from the truth seeking process in

the absence of constitutionally offensive behavior.

II. THE COLORADO SUPREME COURT ERRED IN HOLDING THAT ALL SUBSEQUENT STATEMENTS WERE PROPERLY SUPPRESSED FOR FAILURE OF THE DEFENDANT TO EFFECTIVELY WAIVE HIS MIRANDA RIGHTS.

At the suppression hearing, Dr. Metzner testified that the defendant was aware of what was happening and could understand his rights (J.A. 25-26), but that he was deprived of a meaningful choice whether or not to confess because he believed his only alternative was to kill himself (J.A. 29). The district court found him unable to voluntarily and intelligently waive his Miranda rights because the choices with which he believed himself to be faced were really figments of his imagination and the product of his psychosis. (J.A. 48-49). The Colorado Supreme Court upheld the ruling, characterizing it as a determination that

the defendant was incapable of making an intelligent and free decision with respect to his constitutional rights.[3]

The Fifth Amendment prohibits use by the prosecution in its case in chief only of officially compelled testimony. It is not at all concerned with moral or psychological pressures to confess emanating from sources other than official

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[3]The district court did not actually distinguish the initial statement from those made after Miranda warnings. Because of the defendant's mental condition, it held that none of his statements were voluntary and therefore, "if we would even get that far," it would not be possible to show an effective waiver of Miranda rights (J.A. 48). Since Lego v. Twomey, 404 U.S. 477 (1972), Colorado requires voluntariness of a confession to be proved by a preponderance of the evidence, People v. Smith, 179 Colo. 413, 500 P.2d 1177 (1972) overruling People v. Kelley, 172 Colo. 39, 470 P.2d 52 (1970), but it continues to require that an effective waiver of Miranda rights be demonstrated by "clear and convincing" evidence. See, e.g., People v. Fish, 660 P.2d 505 (Colo. 1983).

coercion. Oregon v. Elstad, 105 S.Ct. 1285, 1292. In Miranda v. Arizona, 384 U.S. 436 (1966), the court found that custodial interrogation by the police was inherently coercive and consequently held that detailed warnings were required to protect the privilege against compelled self-incrimination. Schneckloth v. Bustamante, 412 U.S. 218, 241 (1973). In the absence of the prophylactic Miranda warnings and either exercise or effective waiver of them, it is irrebutably presumed that any statement was the product of official coercion. Oregon v. Elstad, 105 S.Ct. at 1293.

The court made clear that the basis for the decision was the need to protect the fairness of the trial itself. Schneckloth v. Bustamante, 412 U.S. at 241; Miranda v. Arizona, 384 U.S. at 446. Therefore, even though failure to

administer Miranda warnings is not itself a violation of the Fifth Amendment, Oregon v. Elstad 105 S.Ct. at 1292 n.1, the standards announced in Johnson v.Zerbst, 304 U.S. 458 (1938), for waiver of those rights which the Constitution guarantees to a criminal defendant in order to preserve a fair trial, Schneckloth v. Bustamante, 412 U.S. at 237-241, have been required to find a valid waiver. In Johnson v. Zerbst the court said that the state must demonstrate "an intentional relinquishment or abandonment of a known right or privilege." Id. at 464. The requirement is generally described as a "knowing and intelligent" waiver. E.g., Schneckloth v. Bustamante, supra; Edwards v. Arizona, 451 U.S. 477 (1981).

Although the court in Johnson did not separately refer to voluntariness, numerous subsequent cases have. In

Miranda, the court expressly permitted waiver of Miranda rights provided the waiver was voluntary. In Edwards v. Arizona, the court expressed the notion that Johnson added a requirement of awareness to the due process requirement of voluntariness that already existed by considering it reasonably clear that "waivers of counsel must not only be voluntary, but also constitute a knowing and intelligent relinquishment of a known right or privilege." Id. at 483. Edwards also intuitively linked the voluntariness of a waiver with the voluntariness of the admission itself, finding that a determination of the voluntariness of the admission still left unresolved the knowing and intelligent waiver of counsel. Id. at 485. Whether or not a waiver is effective is determined in the totality of the circumstances in a process analogous

to determining the voluntariness of a confession. There is not the slightest suggestion in these cases that the term "voluntary" as applied to waiver of a known constitutional right takes into account any influences on a defendant's will not taken into account by the due process voluntariness standard, or that the formula "voluntary, knowing, and intelligent" means more than being aware of the right to be waived, understanding the consequences of the waiver, and doing so in the absence of any other official overreaching.

The relationship between the Fourteenth Amendment and the requirements for waiver of particular constitutional trial rights is most clear in the context of confessions. The constitutional right of the individual to be vindicated is the same whether or not there is custodial

interrogation. However, the right to have counsel present and to be warned of one's right to remain silent have been extended to the "inherently coercive" atmosphere of custodial interrogation, in order to fully protect the individual's Fifth Amendment privilege against compelled self-incrimination. The requirements of Miranda are an added safeguard to protect against an increased danger of official overreaching. Custodial interrogation is a special instance of official action in obtaining confessions, and therefore an individual is protected in that situation not only by the general due process prohibition against official overreaching but also by the requirement that he be aware of certain specific rights and the consequences of proceeding without exercising them.

This relationship holds equally for waiver of constitutionally granted trial rights generally. There is a clear justification for requiring at an official proceeding at which an individual's life, liberty, and property are at stake that he either be given the rights expressly designed to insure him a fair trial or be made aware of these rights and the consequences of foregoing them. To officially proceed otherwise is itself a kind of official overreaching. Just as custodial interrogation is a special instance of pretrial confessions, a criminal trial is a special instance of government action against individuals. And just as due process protects individuals from abuse of power by government officials generally, specific trial rights protect individuals from

abuse of power by the government in a criminal trial.

Although this court has not yet expressly considered the relationship between the Due Process Clause and the test for waiver of special constitutional trial rights, its comments indicate that it added a requirement of awareness or cognition to an existing protection against official interference with the exercise of free will. See Schneckloth v. Bustamante, 412 U.S. 218 (1973). The consequences that one must be aware of to intelligently waive a specific right will inevitably vary depending upon the nature of the right and stage of the proceedings in question. But they have never yet been considered to include consequences not directly caused by the criminal process. With regard to waiver of Miranda rights, the warnings themselves were created in

order to convey the relevant information. Oregon v. Elstad, 105 S.Ct. at 1294; Wong Sun v. United States, 371 U.S. at 486. Thus far this court has never embraced the theory that the defendant's ignorance of even the full official consequences of his decisions vitiates their voluntariness. See Oregon v. Elstad, 105 S.Ct. at 1297. It is even more certain that the voluntariness of a waiver cannot be vitiated by the defendant's belief, mistaken or not, about consequences he might personally experience even though not the direct result of official proceedings, whether they involve his job, his standing in the community, the love and respect of his family, or even his transcendental reward or punishment.

In this case all of the evidence indicates that the Miranda rights were administered and the defendant's

confession was in no way the product of police over.eaching. Not only was the defendant's confession not induced by police action; under the circumstances he probably could not have been prevented from confessing. The evidence also indicates that the defendant was capable of understanding his rights and the official consequences of their waiver. He was simply unconcerned with the official consequences of confessing because they were less important to him than the unofficial consequences of doing otherwise.

What a criminal defendant must know and the influences he must be free of to effectively waive Miranda rights will necessarily evade express enumeration. But it is possible, and highly desirable, to limit the factors to be considered in determining the validity of a waiver to

those pressures on a particular defendant which the behavior of officials or the criminal process itself creates. To fail to tailor the inquiry in this way would come at a high cost to legitimate law enforcement activity and add absolutely no desirable protection to the individual's interest in not being compelled to testify against himself.

CONCLUSION

For these reasons, the Petitioner requests that the holding of the Colorado Supreme Court be reversed.

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